IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 210 of 2004

Reserved on: 17.08.2007

Date of Decision: 5.09.2007

Ram Singh Appellant.

Versus

State of H. P. Respondent.

Coram

Hon'ble Mr. Justice Surjit Singh, J.

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting[1]? yes

For the appellant : Sh. Shrawan Dogra, Advocate.

For respondent: : Sh. D. S. Nainta, Deputy Advocate General.

Per Surinder Singh, J.

This is an appeal preferred by the accused against his conviction passed by the learned Sessions Judge, Kullu, in Sessions Trial No.74/2003 decided on 5.5.2004, whereby the appellant was sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs. One lakh, under section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, in short the Act, having been found in his possession 6.500 kilograms of Charas.

PROSECUTION CASE

Succinctly, the facts giving rise to the appeal are that on 10.3.2003, a police party headed by ASI Lekh Ram and accompanied by H.C.Krishan Lal (PW1), H.C.Kanhaya, C.Ugam Singh (PW2), L.C.Uma, L.C.Maya Devi and L.C. Harsh Lata, were on patrolling and detection of crime. At about 8.15 A.M. they spotted the appellant coming from the side of village Sainj

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[1] Whether reporters of the Local papers are allowed to see the judgment? Yes.

with a bag hung on his right shoulder, at the place known “Shara”. On seeing the police he returned and tried to escape walking briskly. This aroused the suspicion of the police party, thus he was over-powered and was asked about his identity. Since it was a secluded and isolated place and there was no locality, no independent witness was available. However, PW-1 Krishan Lal and PW2 Ugam Singh, Constables were associated as witnesses.

ASI Lekh Ram, in the presence of PWs 1 and 2 aforesaid, gave an option to the appellant in terms of Section 50 of the Act vide memo Ex.PW1/A. The appellant opted in writing (Mark A) in his own hand and under his signatures on Ex.PW1/A to be searched by the police. Thereafter ASI Lekh Ram gave his personal search to the appellant in the presence of the above police witnesses but nothing offensive was found with him as such memo Ex.PW1/B was prepared. Thereafter, said ASI, who was an authorized officer conducted the search of the bag (Ex.P3) of the appellant and found two polythene packets, on which there was a mark of “Delhi Cloth House” and on the other “Lakhani Shoes”. Both the packets contained 6.500 kilograms charas. Two samples of 25 grams each were separated from the recovered bulk, and were sealed separately with six seals of “T” impression, the remaining bulk was packed and sealed separately with the same seal. The sample of seal was also taken on a separate piece of cloth (Ex.PW4/D). The case property was taken into possession vide memo Ex.PW1/C. Its copy was handed over to the appellant.

On the spot, the NCB form Ex.PW4/C was prepared in triplicate. The appellant was informed of the grounds of arrest and a ruka Ex.PW6/A was sent through C.Ugam Singh (PW2) to the police station for the registration of the case, on the basis of which FIR Ex.PW4/A was formally registered.

ASI Lekh Ram, on the same day, produced the case property along with the N.C.B.Forms and the appellant, before the S.H.O. Banjar (Kullu). He resealed each of the sealed packets of the case property with his own seal “H” and took its impression on Ex.PW6/D. Thereafter, S.H.O. deposited the case property in the Malkhana, with MHC Chaman Lal PW5, he made its entry (Ex.PW5/B) in the register of Malkhana.

Special report Ex.PW3/A was handed over to Dy.S.P. (HQ) Kullu by ASI Lekh Ram himself within the stipulated time, its entry was made by his reader Subhash Chand (PW3) in the relevant register. On 10.3.2003, M.H.C. (PW5) sent one sample of the charas for analysis to C.T.L. Kandaghat through C. Ugam Singh (PW2) along with NCB Form in triplicate vide R.C.No.17/03. It was received in the Laboratory on 11.3.2003.

On the examination of the said sample the Chemical Examiner vide his report Ex.PA found that the said exhibit contained the contents of Charas i.e. Resin 32.24% and the beams alkaline test was also found positive.

Thus the appellant was put on trial under the aforesaid section of the Act. The appellant denied the charge and claimed trial.

The prosecution led their evidence to prove their case and the appellant was also examined under section 313 of the Code of Criminal Procedure. He had simply denied the attendant circumstances put to him. Neither any specific defence was raised nor he led any evidence in his defence.

Upon hearing, the arguments and going through the record, the learned Sessions Judge held the appellant guilty for the offence charged, thus convicted and sentenced him as aforesaid.

CONTENTION IN APPEAL

Feeling aggrieved and dissatisfied with the impugned judgment of conviction and sentence aforesaid the appellant has filed the instant appeal,

precisely on the grounds that there has been a non-compliance of the mandatory provisions of Section 50 of the Act, and also of Section 100(4) of the Code of Criminal Procedure, there was also a mis-statement regarding the arrest of the appellant in the Ruka which smacks of fabrication. The contents of two packets were not sampled and sealed separately, as there was less quantity in one packet and there may be possibility of not containing the charas in another packet, thus it would not have been a case of "commercial quantity" and the appellant would have been sentenced for the lesser sentence. The prosecution case is full of contradictions which raises a doubt on its authenticity, therefore, the conviction of the appellant is bad.

We have heard Sh. Shrawan Dogra, Advocate for the appellant and Sh. D. S. Nainta, Deputy Advocate General for the State and have carefully examined the record to deal with every point raised by the learned counsel for the appellant.

A. Whether there has been non-compliance of Section 50 of the Act? – Held "No"

Sh. Shrawan Dogra, the learned counsel for the appellant has forcefully argued that the appellant was not apprised of his right by the authorized officer, as per the provisions of the Act, therefore, its non-compliance vitiates the trial and renders the recovery of the alleged illicit article illegal. To buttress his contention he has cited the Constitution Bench judgment of the Supreme Court, ***State of Punjab vs Baldev Singh:*** **(1999)6 Supreme Court Cases 172** and also ***Vijay Sinh Chandubha Jadeja vs State of Gujarat*** **(2005) 12 Supreme Court Cases 574 and (2007)1 Supreme Court Cases 433** whereby Jadeja's case was referred to a Larger Bench to crystallize the law laid down in Baldev Singh's case supra, in view of the subsequent different interpretation given by the Supreme Court to the ratio laid down in that case.

Looking to the facts of this case, it is not a case of non-compliance of the provisions of Section 50 of the Act as alleged. The police have complied with the mandatory provisions of Section 50 of the Act, which meets the requirement of law.

As a matter of fact there is no standard form or prescribed method to give the option by the authorized officer to the suspect. It can be oral as well as in writing. In this case the ASI Lekh Ram (PW6) has given the option for search in writing in Hindi Ex.PW1/A apprising his right to be searched before a Gazetted Officer or before a Magistrate and required to exercise his option orally or in writing. The appellant, in his own hand knowing fully well about his right, agreed to render himself for search to the police officer. To this effect his consent in Hindi duly signed by him is encircled in Mark "A" of Ex.PW-1/A and is attested by H.C.Krishan Lal (PW1) and HHC Kanhaya Lal. This fact has been proved by ASI Lekh Ram and H.C. Krishan Lal (PW1) aforesaid in the court which has not been disputed in their cross-examination, therefore, in our considered opinion there has been no violation of Section 50 of the Act. The case law cited by the learned counsel for the appellant is not contrary to what we have said and held above in the facts of this case. But in the instant case, there is no such controversy, as the learned counsel tried to ventilate before us, there is a clear cut compliance of the provisions of Section 50, in writing Ex.PW1/A whereby the appellant has been informed of his right in unambiguous words. Thus this contention raised before us is of no consequence in the proved facts and circumstances of the case.

(B) **Whether the non-compliance of Section 100(4) of the Code of Criminal Procedure vitiates the trial?** **Held "No."**

It is next argued by Sh. Shrawan Dogra, Advocate, for the appellant that Section 51 of the Act provides for the applicability of the provisions of the Code of Criminal Procedure so far as the same are not

inconsistent with the provisions of the Act. Since there is no provision in the Act regarding the association of the independent witnesses at the time of conducting the search, the provisions of Section 100(4) would apply. In this case it was not difficult for the police to associate two independent witnesses to inspire confidence in the search and seizure. Therefore, its non-compliance would make the prosecution story a trash, vitiating the trial.

At the very out set we would like to say that in the facts and circumstances of the case, the provisions of Section 100(4) of the Code of Criminal Procedure are not at all applicable, because, this provision only applies to a case where any place liable to search or inspection (under sub-section (1) or any person in or about such place who is reasonably suspected of concealing about his person any article for which search should be made, to be searched. In the present case, the police did not intend to search any place nor was the respondent present in or about any place intended to be searched and, therefore, the police officials were not supposed to have associated any independent and respectable persons of the area in the course of the search, to satisfy the requirement of Section 100(4) above.

In ***State of H.P. versus Ivor Fleitcher*** (2005) 2 Shimla Law Cases 431 (DB) one of us (Surjit Singh, J.) while speaking for the court, has also taken similar view that non associating of the independent witnesses in the present like situation was neither the requirement of law nor is any way fatal to the case of the prosecution. Therefore, the contention raised by the learned counsel for the appellant has no merit. Accordingly rejected.

(C). **Whether mixing of both the polybags alleged to have contained charas has Prejudiced the case of the appellant. Held "NO "**

It is next argued by learned counsel for the appellant that the contents of two packets alleged to have been recovered were not kept, packed and sealed separately nor the independent samples from each of them were taken. It is ventilated that as per the statement of witnesses, the contents of both the poly-bags were mixed up together , before taking the samples, whereas, one of the packets was lesser in weight. The possibility is that the bigger packet might not be containing the contraband and keeping in view the contents of charas as per Ex.PA, the case of the appellant could have fallen for imposing the lesser punishment because in that case, it may not be a case of “commercial quantity”.

We have also weighed and critically examined this aspect of the matter. To appreciate this contention, the statement PW-6 Lekh Ram ASI needs to be appreciated. According to him, the charas in both the polythene bags were in the shape of sticks and chapattis and was weighed jointly ,which came out to be 6.500 kilograms, from this recovered quantity, two samples of 25 grams each were drawn separately and sealed with seal impression “T”. To a question put by the defense counsel, in the cross-examination he has clarified stated that the charas was mixed up, thereafter it was weighed. This fact was Corroborated by PW-1 Krishan Lal H.C and PW-2 Constable Ugam Singh. Apparently, the physical form of the contraband recovered from both the polythene bags were identical, leaving no room for doubt that in one of the polythene bags the contents were different from the other. The contents of charas on examination were found **32.24%** (Ex.PA).It was not even remotely suggested in the statement of the prosecution witnesses that the contents of one of the bags or none of them contained any contraband. Therefore, in view of the above discussion, we do not

find any force in this plea raised by the learned counsel for the appellant which also fails.

(D) **Whether there are contradictions in the evidence of the case of the prosecution and misstatement in ruka, which are fatal to the prosecution case? Held "No"**

It is further argued by the learned counsel for the appellant that the appellant is alleged to be arrested at 11.30 a.m. on the same day but ruka Ex.PW4/B was sent to the Police Station at 10.30 A.M. disclosing his grounds of arrest, this misstatement coupled with the contradictions in the statement of PWs make the case of the prosecution quite doubtful and gives an impression of fabrication.

In fact, the appellant was apprehended at 8.15 A.M. on 10.3.2003, he was detained by the police. Ruka was prepared at 10.30 A.M. The police Station Banzar is 22 kms from the spot as mentioned in the FIR Ex.PW4/A. The formal arrest of the appellant has been shown, in the grounds of arrest Ex.PW6/B at 11.30 A.M. The FIR was formally registered at 12.15 PM. Krishan Lal (PW1) and Kanhaya Lal (not examined) are the witnesses cited in the arrest memo Ex.PW6/B which was executed and proved by PW6 Lekh Ram ASI. PW Ugam Singh had taken the ruka from the spot to the police station for registration of the case. None of the above averments made by the witnesses were disputed in the cross-examination. PW6 Lekh Ram ASI, Kishori Lal (PW1), Ugam Singh Constable (PW2) witnesses have proved the seizure and arrest their testimonies are consistent. The defence version that the recovery of bag was made from a bus and foisted upon the appellant is denied by them. No motive against them have been imputed by the appellant. The entire proceedings regarding the recovery, sampling, sealing and

documents have been completed on the spot. The N.C.B. forms were also filled in triplicate. The case property and the appellant were produced before the S.H.O. on the same day which fact has been corroborated by PW-4 Jagdish Chand S.H.O. who further deposited the case property in the Malkhana with M.H.C. (PW5) after resealing. PW5 Chaman Lal MHC handed over a sample along with NCB forms to Constable Ugam Singh (PW) on the same day vide R.C.No.17/03 to CTL Kandaghat, on return he deposited the receipt (Ex. PW5/C). The Examiner has certified that the sample duly sealed was received on 11.3.2003 through Constable Ugam Singh aforesaid. The seals tallied and were intact. The sample was given Lab No. 653 and on examination, it was found having contained **32.24% of charas** vide chemical analysis report Ext. PA. The link evidence is complete. According to the witnesses, neither the case property nor the samples were tampered with. The sample was sent to the Laboratory for examination with due promptness. Recovery of the contraband stands proved.

There are no material contradictions and infirmities, pointed out in the evidence as a whole. The testimonies of the prosecution witnesses inspire confidence. The defense was not probablised. The trial Court has rightly and aptly reached to the correct conclusion. Therefore, the above argument of the learned counsel for the appellant is rejected.

CONCLUSION

For the reasons, aforesaid, we are of the considered opinion that the learned trial court has correctly appreciated the evidence led by the prosecution. Thus, we do not find any infirmity and irregularity in the impugned judgment of conviction and sentence.

Accordingly, we confirm the same, resultantly the appeal is dismissed.

No other point is urged before us. The matter is accordingly disposed of.

(Surjit Singh),J.

5th September, 2007
(D)

(Surinder Singh),J.